

Cite as 2018 Ark. App. 558

ARKANSAS COURT OF APPEALS

DIVISION II

No. CR-17-715

TIMMY DALE JESTER

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered: November 28, 2018

APPEAL FROM THE NEVADA
COUNTY CIRCUIT COURT
[NOS. 50CR-16-121, 50CR-16-122,
50CR-16-123, AND 50CR-16-124]

HONORABLE RANDY WRIGHT,
JUDGE

AFFIRMED; MOTION TO
WITHDRAW GRANTED

RITA W. GRUBER, Chief Judge

This case originated on September 26, 2016, when four felony informations were filed against Timmy Dale Jester in the Nevada County Circuit Court. In case No. CR2016-121, Jester was charged with rape under Ark. Code Ann. § 5-14-103 (Supp. 2017) and second-degree sexual assault under Ark. Code Ann. § 5-14-125. Jester was charged with second-degree sexual assault under Ark. Code Ann. § 5-14-125 in case Nos. CR2016-122 and CR2016-124. In case No. CR2016-123, Jester was charged with rape pursuant to Ark. Code Ann. § 5-14-103. Each case involved a different victim who was alleged to be less than fourteen years old. Before trial, the circuit court granted the State's motion for joinder of the cases for trial.

A Nevada County Circuit Court jury convicted Jester of one count of rape in violation of Ark. Code Ann. § 5-14-103 and three counts of sexual assault in the second

degree in violation of Ark. Code Ann. § 5-14-125. He was sentenced to 300 months' imprisonment for the rape conviction and 60 months' imprisonment on each of the sexual-assault convictions. The circuit court ordered the sentence for the rape conviction to run consecutively to one of the sentences for sexual assault, and the other two sexual-assault sentences were to run concurrently with those sentences.

Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Arkansas Supreme Court Rule 4-3(k)(1) (2017), Jester's attorney has filed a motion to be relieved as counsel alleging that this appeal is without merit. Counsel also filed an accompanying no-merit brief containing an abstract and addendum of the proceedings below. In the brief, counsel includes all potentially adverse rulings and explains "why each adverse ruling is not a meritorious ground for reversal." Ark. Sup. Ct. R. 4-3(k)(1).¹ On December 27, 2017, Jester filed pro se points for reversal primarily alleging that each of the four alleged victims was lying. On September 6, 2018, Jester filed additional pro se points adding ineffective-assistance-of-counsel arguments as well as arguments that no DNA evidence was introduced, that the alleged victims were all coached by the same child-advocacy person and gave almost the exact testimony, and that opinions of the alleged victims and their families were shared with the public on social media. The State has filed a brief in response to each set of Jester's pro se points as required by Rule 4-3(k)(3).

In compliance with the directives of *Anders* and Rule 4-3(k)(1), counsel for Jester contends that he has thoroughly reviewed the record in this case and has found no error

¹This is Jester's appellate counsel's second attempt in filing a no-merit appeal. In the first attempt, we denied counsel's motion to be relieved and ordered rebriefing. *Jester v. State*, 2018 Ark. App. 360.

that would support an appeal. As required by Rule 4-3(k), the reasons the adverse rulings provide no meritorious grounds for appeal are discussed in the brief. Counsel has abstracted and briefed all adverse rulings, which included adverse rulings during jury selection, adverse evidentiary rulings, the denial of the directed-verdict motion, and the denial of the motion for new trial.

In his original pro se points, Jester argues how each of the four victims lied in her testimony. In its response, the State fairly characterizes Jester's pro se points as a challenge to the sufficiency of the evidence. The State contends that a challenge to the sufficiency of the evidence is not preserved for appeal because he failed to make a specific directed-verdict motion at trial. In order to challenge the sufficiency of the evidence on appeal, a specific directed-verdict motion identifying the elements not proved by the State must be made at both the close of the State's case-in-chief and at the close of all the evidence. *See* Ark. R. Crim. P. 33.1; *Eastin v. State*, 370 Ark. 10, 15, 257 S.W.3d 58, 62–63 (2007). Alternatively, the State responds that there is sufficient evidence to support the convictions, noting that Jester's allegations that the victims lied goes to the credibility of each victim's testimony and that the testimony of the victim describing the sexual contact need not be corroborated and is enough to sustain the conviction. *See Jeffries v. State*, 2014 Ark. 239, at 5, 434 S.W.3d 889, 893 (“[I]t is the function of the jury, not the reviewing court, to evaluate the credibility of the witnesses and resolve any inconsistencies in the evidence.”); *see also Europe v. State*, 2015 Ark. App. 460, at 4, 468 S.W.3d 792, 795 (stating the principle that the uncorroborated testimony of a rape victim, which is sufficient to support a conviction if the

testimony satisfies the statutory elements of rape, also applies to sexual offenses other than rape).

In his additional pro se points, Jester makes nine allegations. In its response, the State accurately notes that six of the points involve allegations of ineffective assistance of counsel.² Claims of ineffective assistance of counsel will not be considered on direct appeal unless the issues have been considered by the circuit court. *Gordon v. State*, 2015 Ark. 344, at 4, 470 S.W.3d 673, 675. In the remaining three points, Jester contends that no DNA evidence was introduced, that the alleged victims were all coached by the same child-advocacy person and gave almost the exact same testimony, and that opinions of the alleged victims and families were shared with the public on social media. The State responds that the three remaining arguments were not argued in the circuit court and are thus not preserved for appeal. The law is well settled that to preserve an issue for appeal, a defendant must object at the first opportunity. *Id.* The State contends that to the extent Jester's assertion that no DNA evidence was introduced is a challenge to the sufficiency of the evidence, it previously addressed the issue in response to Jester's original points and which we addressed above. Finally, the State also asserts that Jester does not allege a trial error occurred in regard to his pro se point that the opinions of the victims and their families were shared with the public on social media and further that Jester's counsel objected to and successfully removed jurors who had been influenced by social media, as addressed in counsel's no-merit brief. We agree

²One of the claims of ineffective assistance of counsel raised in the additional pro se points was also mentioned in the original pro se points.

with the State that Jester's pro se points do not support an appeal because they are either not preserved or do not support reversal.

The test for filing a no-merit brief is not whether there is any reversible error but whether an appeal would be wholly frivolous. *House v. State*, 2015 Ark. App. 280. Based on our review of the record and the brief presented, we find that there has been compliance with Rule 4-3(k) and that there is no merit to an appeal. We also conclude that there is no merit to Jester's pro se points. Consequently, we grant counsel's motion to withdraw and affirm the convictions.

Affirmed; motion to withdraw granted.

GLADWIN and BROWN, JJ., agree.

Joseph C. Self, for appellant.

Leslie Rutledge, Att'y Gen., by: *Adam Jackson*, Ass't Att'y Gen., for appellee.